INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 971

BINKLEY MINING COMPANY OF MISSOURI, PETITIONER

v.

DAN H. WHEELER, ACTING DIRECTOR, BITUMINOUS COAL DIVISION, UNITED STATES DEPARTMENT OF THE INTERIOR, AND HAROLD L. ICKES, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The report of the examiner and the memorandum opinion and order of the Acting Director of the Bituminous Coal Division approving and adopting the report of the examiner are set forth in the record (R. 83–90, 107–114). The opinion of the Circuit Court of Appeals (R. 119–121) is reported in 133 F. (2d) 863.

JURISDICTION

The decree of the Circuit Court of Appeals (R. 122) was entered on March 5, 1943. The petition for writ of certiorari was filed on April 28, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

The petition appears to raise two basic questions:

1. Whether the court below properly affirmed the refusal of the Acting Director of the Bituminous Coal Division to terminate a proceeding on a complaint alleging willful violations by petitioner of the minimum price provisions of the Bituminous Coal Act and the Bituminous Coal Code, and filed pursuant to Sections 4 II (j) and 5 (b) of the Act by Bituminous Coal Producers Board for District No. 15, where the District Board subsequently sought termination of the proceeding by withdrawal or dismissal of the complaint.

2. Whether the court below properly affirmed the order of the Acting Director holding that the petitioner "willfully" violated certain provisions of the Act and Code and directing it to cease and desist from further violation.

STATUTE INVOLVED

The pertinent provisions of the Bituminous Coal Act of 1937, c. 127, 50 Stat. 72, 15 U. S. C.,

sec. 828 et seq., as amended are set forth in the appendix to our brief in opposition in No. 970.[1]

STATEMENT

On June 12, 1941, the Bituminous Coal Producers Board for District No. 15 (hereafter called District Board 15) filed a complaint with the Bituminous Coal Division pursuant to the provisions of Sections 4 II (j) and 5 (b) of the Act, alleging that petitioner made certain sales of coal to the Omar Baking Company[2] at prices less than the applicable minimum prices established by the Division, and thus willfully violated the provisions of the Bituminous Coal Code and rules and regulations issued thereunder (R. 10–13). The complaint requested that the Division either revoke the code membership of petitioner, or, in its discretion, direct petitioner to cease and desist from further violations. On August 2, 1941, a hearing on the complaint was scheduled for September 10, 1941, in Kansas City, Missouri (R. 14–16). Personal service was made on petitioner (R. 18). Issue was joined when on August 9, 1941, petitioner filed an answer generally denying the allegations of the complaint (R. 18–19).

By motion, dated August 25, 1941, District

[1] The original Act has been extended by amendment, April 11, 1941, 55 Stat. 134, 15 U. S. C., Supp. I, sec. 849, and April 24, 1943, P. L. 40, 78th Cong., 1st sess., c. 68, H. J. Res. 113.

[2] The name of this company has been changed to Omar, Incorporated (R. 36).

Board 15 sought to withdraw its complaint and cancel the scheduled hearing (R. 19–24). The Director, observing that proper administration of the Act required that the hearing be held, denied this motion September 5, 1941, without prejudice to petitioner's right to renew it at the close of the hearing (R. 24–25). The scheduled public hearing was thereupon held on September 10 and 11, 1941, before a duly designated examiner of the Division (R. 27–83). District Board 15 and petitioner appeared and filed a joint stipulation to dismiss the proceeding which was referred to the Director (R. 26, 28). Upon complainant's refusal to introduce such evidence as it had in its possession (R. 28–34), a representative of the General Counsel's Office of the Division obtained leave from the examiner to introduce evidence in the possession of the Division bearing upon petitioner's alleged violations (R. 35). Petitioner cross-examined the witnesses called by the Division (R. 39–69) and produced a witness on its own behalf (R. 69–73). Counsel for District Board 15 also cross-examined one of the Division's witnesses (R. 67).

On February 25, 1942, the examiner submitted his report[3] in which he found that petitioner had

[3] The report of the examiner treated this proceeding and the one involved in No. 970 in one consolidated report because the transactions involved were similar and concerned the same code member. The same procedure was followed by the Director.

willfully violated the provisions of the Act, the Code, and the Schedule of Effective Minimum Prices for District No. 15 for All Shipments Except Truck. The examiner recommended that an order be entered requiring petitioner to cease and desist from further violations (R. 83–90). Petitioner filed exceptions to the report with a supporting brief (R. 94–105). On June 4, 1942, the Director, in a memorandum opinion and order (R. 107–114), rejected the contention that the joint stipulation deprived the Division of jurisdiction to go forward with the hearing. The Director denied the exceptions and approved and adopted the findings and conclusions set forth in the examiner's report. The following facts appear from the administrative findings and the undisputed evidence adduced at the hearing:

Petitioner, Binkley Mining Company of Missouri, operates the Bee-Veer Mine, designated as Mine Index No. 13, located in Macon County, Missouri, in District No. 15 (R. 35). Petitioner has been a member of the Bituminous Coal Code throughout the period involved in this proceeding (R. 2). Omar Incorporated, is a corporation engaged in part in the production of bakery products (R. 35–36). It operates a baking plant in Omaha, Nebraska, and a distributing warehouse in Lincoln, Nebraska (R. 36–37). Both of these plants are parts of the baking division of Omar, which purchases all of its coal from petitioner

(R. 54). Coal is used at the Omaha baking plant for both processing and space heating; at the Lincoln warehouse approximately 2⅓ carloads of coal are used each year, exclusively for space heating (R. 36, 54–55).

On March 30, 1940, the Binkley Coal Company, petitioner's subsales agent, and Omar entered into a contract providing that petitioner was to supply the Omaha baking plant of Omar with the "Season's requirements" from April 1, 1940, through March 31, 1941 (R. 39–43). Omar was to pay $1.49 per ton f. o. b. the Bee-Veer Mine for coal shipped from September 1940 through March 1941 (R. 39). Subsequent to the date of this contract, about August 1940, Omar began to use the warehouse at Lincoln, Nebraska (R. 53–54). Whenever coal was needed at the new warehouse, J. J. Havlicek, the office manager of Omar's bakery division, telephoned A. R. Toomey, a salesman of Binkley Coal Company, and ordered a carload of coal for shipment to the Lincoln warehouse (R. 55–56, 58). Between October 1940 and March 1941, petitioner, through its subsales agent, Binkley Coal Company, sold to Omar three carloads of coal containing altogether approximately 141 tons of 1¼" washed screenings coal (designated in the applicable Schedule of Effective Minimum Prices for District No. 15 for All Shipments Except Truck as Size Group 13) for deliv-

ery to the Lincoln warehouse [4] at a price of $1.49 per net ton f. o. b. the mine (R. 45–51).

The Schedule of Effective Minimum Prices for District No. 15 for All Shipments Except Truck, promulgated by the Division and effective on October 1, 1940, provided for classification of consumers in accordance with the marketing practice of the region in which petitioner marketed its coal. Thus, separate and different minimum prices for coals sold for domestic and commercial uses, including space heating, on the one hand, and industrial uses on the other, were established (R. 35). Price Instruction No. 9 of the District No. 15 minimum price schedule required that, in order for the industrial classification to apply, the fuel must be needed each day of the year when products of the consumer are produced and must be used principally for the purpose of manufacturing or processing.[5] In the light of the price instruction, during the period involved, the minimum price established for petitioner's 1¼″ washed screenings coal when sold for space heat-

[4] One carload was shipped originally to Omaha, Nebraska, but was reconsigned in transit to Lincoln, Nebraska, by Toomey (R. 47, 61–62).

[5] So far as here pertinent, Price Instruction No. 9 of the Division's minimum price schedule provides:

"PART I—DOMESTIC AND COMMERCIAL USE AND INDUSTRIAL USE

"(a) Prices shown for Domestic and Commercial Use apply (1) on all sales in retailing of coal. (2) *On all sales of coal to consumers using coal principally for space heat-*

ing was $1.65 per net ton f. o. b. the mine (R. 90, 114).

The salesman, Toomey, representing petitioner's subsales agent, knew that the coal ordered by Havlicek was to be used at the Lincoln, Nebraska, warehouse of Omar (R. 60), but assumed that the coal would be used for the same processing purposes as was the coal moving under contract to the baking plant of Omar at Omaha, Nebraska (R. 58–60). Toomey knew that the minimum price schedule drew a distinction between coals sold for processing and coals sold for space heating (R. 59). Copies of the effective minimum prices and the Marketing Rules and Regulations of the Division had been made available to him (R. 59–60, 62–63). Nevertheless, Toomey made no investigation and had no discussion with Omar's officers or employees concerning the use to which the coal was to be put at the Lincoln warehouse (R. 57–63).

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ing. (3) On all other sales except Industrial Use and as provided for in Part II Special Purpose Use and Part III Railroad Locomotive Fuel Use.

"(b) Prices in the Industrial Use Schedule apply only where sale is made by the Producer Code Member, his authorized agent, or a registered wholesaler or jobber and where the coal moves direct from the mine of the producer to the consumer using the fuel principally for (1) the purpose of driving steam engines or turbines. (2) The purpose of manufacturing or processing if fuel is required each day of the year products of the consumer are produced." [Italics supplied.]

William G. Gregory, vice president of petitioner and of its subsales agent, Binkley Coal Company, and general manager of the western division for Binkley Coal Company, was directly in charge of the sale of petitioner's coal to Omar (R. 64). He was in charge of the marketing of approximately 20,000 carloads (10 million tons) of coal a year (R. 64).[6] Gregory is an active member of District Board 15 and is familiar with the minimum price schedule for District 15 and the Marketing Rules and Regulations (R. 67). Nevertheless, he made no investigation concerning the use to which the three carloads of coal shipped to the Lincoln warehouse of Omar were to be put (R. 64–90).

Under these circumstances, the Director found that petitioner should have sold its 1¼" washed screenings coal to Omar at $1.65 per ton f. o. b. the mine rather than at $1.49 per ton f. o. b. the mine in view of the fact that the coal was used exclusively for space heating rather than processing or manufacturing purposes. He found that petitioner's failure "to make any effort to determine the use to which the coals were to be put" amounted to a "wilful disregard" of its obligations as a code member (R. 113). He accordingly found that petitioner's violation was willful within the meaning of the Act.

[6] Presumably this includes coal produced at mines other than the Bee-Veer Mine.

The Director likewise held that upon the filing of the complaint by District Board 15, the jurisdiction of the Division was invoked to determine whether or not willful violations of the Act had been committed. Despite the desire of District Board 15 to withdraw its complaint or to have the proceeding dismissed, the Director held that the Division could properly proceed to determine the issues raised in the complaint. Pointing out that, where a district board fails for any reason to take action authorized or required by the Act, Section 6 (a) empowers the Division to take such action in lieu of the district board, the Director held that it was proper for representatives of the Division to participate in the proceeding and to assure a full exploration and development of the issues and pertinent evidence. (R. 109–114.)

The Circuit Court of Appeals affirmed the order of the Director requiring the petitioner to cease and desist from further violations (R. 119–122). The court, relying on its decision in No. 970, upheld the Director's right to continue the proceeding over the objection of District Board 15. The court held that the Director's finding concerning the selling of coal below the applicable minimum price "was clearly supported by substantial evidence and * * * the acts of violation charged in the complaint were established" (R. 120). The court further held that "the inference of 'wilful violation' which the Exam-

iner and the Director drew from the circumstances of the violation disclosed by the evidence and established by the findings was * * * an inference which could be fairly and reasonably deduced" (R. 121).

ARGUMENT

1. Petitioner argues, as in No. 970, that after District Board 15 filed a complaint pursuant to Sections 4 II (j) and 5 (b) of the Act and thus invoked the jurisdiction of the Division, it had an unqualified right to withdraw its complaint and have the proceeding discontinued. For the reasons set forth in our brief No. 970, we believe that the court below correctly affirmed the Director's decision that the Division was not precluded by the subsequent action of District Board 15 from investigating and redressing willful violations of the Act.

2. The court below correctly held that there was substantial evidence to support the Director's conclusion that petitioner had willfully violated the minimum price provisions of the Act and Code. It is not disputed that petitioner sold a substantial quantity of coal at less than the applicable minimum price established in the price schedule duly promulgated by the Division. While petitioner claims that the violations were not "willful" within the meaning of the Act, the evidence shows that petitioner's responsible employees and agents were aware of the requirements of the price

schedule and the distinction made by Price Instruction No. 9 between coal sold for domestic and commercial use and coals sold for industrial use. The evidence further shows that although the means of obtaining knowledge of the use to which the coal was being put was readily available to petitioner's employees, they made no attempt to ascertain it. This Court has frequently recognized that one cannot "shut his eyes or his ears to the inlet of information" and seek refuge from legal responsibility behind ignorance either actual or purported. *Simmons Creek Coal Co.* v. *Doran,* 142 U. S. 417, 437; *The Lulu,* 10 Wall, 192, 201–202; *Angle* v. *North-Western Mutual Life Ins. Co.,* 92 U. S. 330, 342. As a producer of bituminous coal which had availed itself of the statutory privilege to avoid paying the 19½ percent tax on its sales by accepting membership in the Code, petitioner was under an affirmative duty to assure itself that it was not selling its coal at prices less than those permitted in the schedule promulgated by the Division. In the context of the Act, as the authorities cited in our brief in No. 970 affirm, the statutory requirement of willfulness does not demand a showing of malevolence or deliberate intent to reduce the statutory minimum price structure to impotence.

CONCLUSION

The judgment below is correct and is in accordance with the decisions of this and other courts. The petition for certiorari should be denied.

Respectfully submitted.

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